UNITED STATES	)	
	)	**DEFENSE REPLY TO**
v.	)	**GOVERNMENT MOTION**
	)	**FOR PROTECTIVE ORDER**
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 13 March 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. The Defense requests that the Court deny the Government's proposed Protective Order. The Defense further requests that the Court grant the Defense's proposed Protective Order (with or without the minor amendments referenced herein). *See* M.R.E. 505(g)(1). Additionally, the Defense requests that Mr. Prather and the relevant OCA be produced as witnesses for the motions argument.

WITNESSES/EVIDENCE

2. Aside from all Motions and attachments already in evidence, the Defense references herein the following additional evidence:

- Attachment A: Government Email to Defense Dated 26 February 2012
- Attachment B: Court Protective Order —*United States v. Diaz*
- Attachment C: Memorandum of 18 September 2010 to Staff Judge Advocate re: "Preliminary Classification Review of the Accused's Mental Impressions—*United States v. PFC Bradley Manning*"

ARGUMENT

3. The Government's proposed Protective Order is not only nonsensical, it is it downright draconian. The Defense maintains that if the Government's Proposed Protective Order is approved, PFC Manning will be denied his right to counsel in contravention of the Sixth Amendment of the United States Constitution. Moreover, the Defense is dumbfounded that CPT Fein would indicate in his 26 February 2012 email to Mr. Coombs that the Government's Protective Order would be something that the Defense would "likely be 98% amenable with." *See* Attachment A. The Government could not have been more off-the-mark. The Defense maintains that the Government's Protective Order is the equivalent of using dynamite to kill a fly.

4. M.R.E. 505(g)(1) allows a court to make an "appropriate" protective order to guard against "disclosure of classified information." Here the Government's requested order is both not "appropriate" within the meaning of M.R.E. 505(g)(1), nor it is designed to guard only "classified" information. It is designed to guard information that is not classified, but that the Government feels should be "treated as classified." Moreover, the restrictions that the Government would attempt to place on the Defense are far outside of the realm of the measures contemplated under M.R.E. 505(g)(1)(A)-(G).[1]

5. At the outset, the Defense would note that its Protective Order does not contain "countless legal and factual errors" as stated by the Government. *See* Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 2. Simply because the Government does not like the Defense's Protective Order does not mean that the Protective Order contains "countless legal and factual errors." (*See* discussion, *infra* at C.).

6. The Defense's Protective Order was adapted from the Protective Order in *United States v. Diaz*, 2009 CCA LEXIS 79 (N-M.C.C.A. Feb. 19, 2009), *aff'd*, 69 M.J. 127 (C.A.A.F. 2010). Indeed, the Protective Order endorsed by the military judge in *Diaz* had been drafted and proposed by the Government in that case (not the Defense). *See* Attachment B. Thus, the Protective Order the Defense submits should govern this case—one which apparently contains countless factual and legal errors—was very similar to a Protective Order advanced by the Government, and adopted by the Military Judge in *Diaz*. Notably, the *Diaz* court thought that a Protective Order in the nature of what the Defense is currently submitting was appropriate to deal with classified information that was not already available in the public realm. Additionally, the *Diaz* case has been reviewed by both the Navy-Marine Court of Criminal Appeals and the Court of Appeals for the Armed Forces; neither of these courts expressed any concern with the Protective Order in that case.

7. To the extent that there are differences between the *Diaz* Protective Order and the current Defense Protective Order, this was simply designed to deal with the issue of inadvertent spillage. From a review of the Government's motion, it appears that it too also had access to the *Diaz* Protective Order. If the Government did have access to the *Diaz* Protective Order, this makes its attack regarding the Defense's "countless" errors particularly disingenuous.

---

[1] (1) Protective order. If the government agrees to disclose classified information to the accused, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge;
(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;
(C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;
(D) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense;
(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;
(F) Regulating the making and handling of notes taken from material containing classified information; or
(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

8. Below, the Defense will separately address the following issues:

A. Fundamental Problems with the Government's Protective Order
B. Other Problems with the Government's Protective Order
C. Addressing the Government's Concerns with the Defense's Protective Order and Associated Motions

In sum the Defense maintains that the Government has lost all perspective on this issue. The case has been ongoing for nearly two years, largely without incident. That the Government views a future *potential* and *internal* "spillage" (or "spillage" by inference) as having the potential to cause "exceptionally grave damage[] to the national security of the United States"[2] when it acknowledges that the information is already in the public domain is wholly unreasonable and out of touch with reality. *See* Government Proposed Protective Order, paragraph 3.q. By this statement, the Defense certainly does not intend to minimize the importance of safeguarding information; however, it approaches the issue with a modicum of common sense in light of the realities of criminal litigation.

A. Fundamental Problems with the Government's Protective Order

9. The Government's Protective Order is far too broad. It treats unclassified information as classified information and requires that the Defense (but not the Government) take onerous steps to safeguard this unclassified information.[3] In this respect, the Defense will address:

i) The Government's creation of a new category of information, "information treated as classified."
ii) The scope of the definitions of classified information.
iii) The Government's proposal that all Defense team members work on all non-procedural matters from a classified computer at an appropriate "government facility."
iv) The Government's procedure for filing documents.
v) The Government's sanctions for disclosing "classified" information.

10. Information "Treated as" Classified: The Government has invented a new category of information that it believes should be subject to a Protective Order—information that is "treated as classified". The Government has prepared a list on its own, entitled *Judicial Order to Treat Certain Information As Classified Information* ("Supplemental Order"), wherein lists facts, information, or things that it believes should be "treated as classified." *See* Government Proposed Protective Order, paragraph 3.n.(4). There is no such category of information to be "treated as classified" information is either classified or it is not. As the Government is so apt

[2] Under Executive Order 13526, it is only Top Secret information that has the potential to cause exceptionally grave damage to national security. *See* § 1.2(1). PFC Manning is not even charged with disclosing Top Secret Information. Moreover, the Defense believes that the damage assessments that it has been requesting in discovery for years will reveal that the original alleged disclosures did not cause damage—much less "exceptionally grave damage"—to national security. If this is the case, how can a second disclosure of that same information cause exceptionally grave damage? The Government loses all credibility when it makes such ridiculous assertions.
[3] This is ironic given that the Government has, on at least two occasions, inadvertently disclosed classified information itself.

to point out, *only the OCAs* can determine whether something is or is not classified. By adopting the "treated as classified" procedure, the Government has usurped the role of the OCAs by unilaterally deeming certain things to be "off limits" for either the Defense or the Court to mention.

11. If this list were approved in writing by the relevant OCAs as actually ***being*** classified, the Defense would obviously not reference the information. Presumably this could have been done and submitted to the Court and the Defense as part of this motion.[4] Tellingly, the Government acknowledges "that the Supplemental Order is not a substitute for a classification review by an appropriate Authority." *See* Government Proposed Protective Order, paragraph 3.n.(4). If that is the case, why weren't the items in the Supplemental Order shown to the OCAs and actually determined by the OCAs to be classified, rather than "treated as classified"?

12. The fact the Government chose to put things on its list, but not to get an OCA statement that the material is, in fact, classified should speak volumes. It signals that the information is not actually classified—it is simply information that the Government does not want the Defense to reference. Absent a showing that something is actually classified, the Government does not get to restrain the Defense's speech in this manner.

13. The Government justifies its "treated as classified" category of information as being a way to "facilitate an efficient filing process that protects classified information." *See* Government Proposed Protective Order, paragraph 3.n.(4). The Government's proposal is anything but efficient, as discussed below. Moreover, the Government is wrong when it says that it is a process for "protect[ing] classified information" it is instead a process for protecting what the Government thinks should be "off limits" for the Defense.

14. The Government's position on the "treated as classified" information is also internally incoherent. If the information is on the Government's list, it is deemed to be classified and it cannot be referenced. If instead, the Court Security Officer sees something in a filing that is not on the list, but he believes is classified, then the Government proposes that the parties go through the process of having the OCA determine whether the information is classified. If the Government envisages a role for the OCAs, why have the OCAs not approved the government-created list?

15. The implication of the Government's position is that motions and filings which do not actually contain classified information (but simply information that the Government deems should be "treated as classified") will be shielded from public view. Undoubtedly, this is an ancillary benefit to the Government, who will be protected from public scrutiny in a high-profile case.

---

[4] Indeed, at page 1 of its Supplement to Prosecution Motion for a Protective Order, the Government refers to Enclosure 1 as providing just a "small sampling of classified information that might otherwise seem unclassified, but has been determined to be classified by the appropriate OCAs." The Defense questions why, to the extent that a list of classified items is appropriate, *this list of actually classified items*, is not the appropriate one to be using in the instant case? As long as everything on the list has been determined to be classified by the OCA and evidence is provided to that effect, the Defense would not object to a list.

16. To the extent that the Court would consider creating a category of information that should be "treated as classified" (which the Defense submits the Court should not consider), the Defense requests that it have the ability to challenge certain things on the list by submitting a request to the relevant OCA as to whether the material is actually classified. The Defense objects to relying on the sheer say-so of the Government that something should be "treated as classified."

17. Definition of "Classified" Information (paragraph 3. c.(1)). The Defense objects to the Government's definition of "classified" information in paragraph 3.c.(1)(d), (e) and (f) in its proposed Protective Order. The scope of these provisions is alarmingly broad and would deem almost everything to be classified.

18. For instance, paragraph 3.c.(1)(e) of the Government's proposed Protective Order says that "classified" information is "any information ... that refers or relates to national security or intelligence matters."[5] Para. 3.c.(1)(f) is similar in that it covers "any information obtained from any agency, department or other governmental entity ... that refers to national security or intelligence matters." This could mean that almost every document involved in this case would be classified, as they can all be construed as "referring" or "relating" to national security or intelligence matters.

19. Paragraph 3.c.(1)(d) of the Government's Protective Order states that "classified" information includes "any document and information, including non-written, aurally [sic.] acquired information, which the accused or defense counsel have been notified orally or in writing that such document or information *may* be classified." (emphasis added). Notably, the Government does not state that the information is actually classified. Rather, all it would take for the Government to prevent the Defense from mentioning something in a filing (or having to file something under classified procedures) is for the Government to say that "We believe X fact is classified." If the Government genuinely believes "X fact" to be classified, the appropriate course of action is to determine through the OCA process whether "X fact" is actually classified. Through this provision, the Government is trying to surreptitiously have the ability to play the trump card on whether the Defense is able to reference certain information.

20. Restrictions on Accused's Constitutional Right to Counsel: Equally troubling (or perhaps even more so) is the Government's attempt, under the guise of a Protective Order, to deny PFC Manning his right to counsel. In paragraph 3.k. of its Protective Order, the Government advances an incredulous proposition: that Defense counsel shall prepare any and all pleadings or other documents, including substantive communications (i.e. email), in a "government facility." In short, the Government proposes that the Defense team literally move to a place with an

[5] The Defense Protective Order also deems classified information to be "any information, regardless of place of origin, that could reasonably be believed to contain classified information, or that refers to national security or intelligence matters." In retrospect, and in light of the Government's current motion, the Defense does not believe this to be an appropriate provision for the Protective Order and would ask that the court strike that subsection from the Defense's Protective Order. Under normal circumstances, that Defense would think that the parties would exercise common sense in interpreting this provision. However, the Defense now believes that the Government will interpret this provision as applying to all documents which reference or refer to national security or intelligence matters, even if they are clearly not classified or believed to be classified.

approved "government facility" (Kansas[6], Washington D.C. or Maryland) for the next six months while preparing for trial. Every time that Defense counsel would want to jot down notes for a pleading or cross-examination, draft documents, or send the Court or Government an email, it would have to do so from an approved government facility. Such a suggestion is patently outrageous. *See also* Protective Order, paragraph 3.1.(4) (all documents prepared by the defense that "do or may contain classified information" shall be "prepared only by persons who have received an appropriate approval for access to classified documents and information, and in the government facility on the three provided laptop computers...").

21. Moreover, there is no logical reason why Defense counsel would have to do all substantive work on this case in a government facility, while the Court would not. In other words, it makes no sense to distinguish between the Court and the Defense in this respect. If the Government believes that moving to a place with a government facility for the next six months is how the Defense must proceed, it must also believe that Your Honor must transact all business dealing with this case (other than purely procedural issues) from a secure government facility.

22. If the Defense is required to work only from a government facility, the accused will be denied his right to counsel. Major Kemkes is currently attending ILE training, which would make it physically impossible for him to work from a government facility. That would mean that one of the accused's counsel would not be able to work on this case at least for the next few months.

23. Mr. Coombs lives in Providence, Rhode Island.[7] He has a family and other professional obligations. Under the Government's proposed plan, Mr. Coombs will be forced to leave his family for the next six months and secure housing and transportation in Maryland, at a significant personal cost to him or his client.[8] Moreover, every time Mr. Coombs would want to work on the case (which is very often), he would need to physically be in a government facility. If he were to wake up in the middle of the night and want to work on the case, he would need to go to a government facility and work on one of three designated laptops. If the Military Judge were to ask Mr. Coombs to respond to an inquiry on a non-procedural matter (e.g. "what is your position on the *Jones* case?"), Mr. Coombs would have to physically travel to a government facility to respond.[9] Further, it seems that Mr. Coombs would not be able to use a blackberry or his personal computer to receive email; any email related to this case would only be available if Mr. Coombs physically went to the government facility.

---

[6] The Government refers to the Trial Defense Service Office on Fort Leavenworth, KS as being a "government facility" within the meaning of the Protective Order. As the Government knows, PFC Manning was moved to Fort Meade prior to the arraignment in early February and is not scheduled to go back to Kansas. As such, it is unclear why this is listed as a "government facility" as it is not a viable location from which to operate.

[7] My apologies for the (somewhat obnoxious) reference to myself in the third-person. It seemed to be the clearest way to delineate between the accused's counsel.

[8] A conservative guess of the expenses that Mr. Coombs would incur is in the range of $30,000-$40,000.

[9] In all likelihood, the government facility that Mr. Coombs would be working from is the trailer on Fort Meade, Maryland. Although TDS offices are also on the list of "government facilities," the Defense does not believe that TDS would allow civilian counsel full and unfettered access to TDS offices to work on a case for six months or longer.

24. This is all in stark contrast with Government counsel. All the Government attorneys in the case could work on unclassified matters on their personal computers and could receive and send emails on their personal computers or handheld devices. They could work on motions in their office or in the comfort of their home, according to their personal schedule. They would be able to respond to emails from the Court, witnesses, and relevant parties instantaneously and with ease. Meanwhile, Mr. Coombs would be figuratively shackled to Fort Meade, Maryland for six or more months, travelling to the "government facility" any time he had any thoughts or wished to send any non-procedural email. This proposal is absolutely ludicrous. No counsel should have to try to defend a client under these draconian restrictions. The Defense would hazard to guess that no court martial proceeding, or any criminal proceeding in the United States, has been tried under these conditions. Not only would this violate the accused's right to counsel in contravention of the Sixth Amendment, it would be an impermissible restriction on the liberty interests of the Defense team.

25. This "solution" offered by the Government would have the obvious effect of dampening the vigor with which the Defense team could mount a defense. It would have the corresponding benefit for the Government of litigating against a weaker opponent. The Defense believes that this was actually the intent of the provision and is genuinely disappointed in the Government, a representative of the United States, for resorting to such tactics.

26. The Defense has, for almost two years, been able to vigorously defend the accused without the need for such unprecedented measures. There has been only one incident of claimed spillage by the Defense a "spillage" that the Government concedes was only such because the information was classified by inference. The Defense cannot fathom how the Government could, in good faith, advance this restriction as part of its Protective Order to deal with pleadings and filings which are unclassified. The Defense is fully aware of its responsibilities to guard classified information; it does not need to be in virtual lockdown to guard against the possibility that something it *might* say (which it knows not to say) *might* be determined by the Government to constitute unauthorized disclosure by inference.

27. Filings with the Court: The Government's proposal for only the Defense[10] to file every document (other than strictly procedural in nature) under seal even if it does not contain classified information is unnecessary. It places an undue burden on the Defense because it requires that the document be filed in person or through secure email, even where it is abundantly clear that the document is not classified.

28. At paragraphs 3.n.(2) and (5) of its Protective Order, the Government seems to contemplate that it will be the Defense security experts who will physically file the relevant motions. It is not clear why it must be the Defense experts who file the motions and not the Defense attorneys (given that, under the Government's proposal, the Defense attorneys will be at Fort Meade). Hard copy delivery would be impossible in most cases, as the Defense security experts are not physically located at Fort Meade, but rather in Washington D.C. And all of these measures are proposed to be in place in order to provide the Court Security Officer with what everyone knows is an unclassified document.

[10] The Government is not placed under the same burden as the Defense to file every document other that "purely administrative motions, such as extensions of time or continuances" under seal. *See* paragraph 3.o.

29. At paragraph 3.n.(1) of its Protective Order, the Government indicates that all Defense filings must be submitted to the Court Security Officer by midnight on the date of filing. There is also a corresponding provision for the Government at paragraph 3.o. Is the Government suggesting the Court Security Officer stay in his office until after midnight on the dates of Defense and Government filings to order to receive the relevant information (whether by secure email or by hand delivery)? If so, it is impossible to reconcile this requirement with the Government's position that having Mr. Prather testify about his role in a preliminary hearing is too onerous a requirement to place on him. *See* page 5, Prosecution Response to Defense Motion for Appropriate Relief under Military Rule of Evidence 505.

30. Moreover, the Government's proposal for *ex parte* filings by the Defense at paragraph 3.n.(3) is laughable, as it contemplates the Government examining the potentially classified portion of the *ex parte* filing. The Government notes that if the Court Security Officer determines that the *ex parte* filing may contain classified information, he must inform the Defense and Trial Counsel of that fact. The Defense must then provide a "classified information supplement" and turn that over to the Trial Counsel. Under the Government's proposal, "The trial counsel shall then consult with the appropriate agencies to determine whether the supplement contains classified information." The Defense does not understand how the *ex parte* nature of the filing is maintained if the Government has a role in reviewing the information in conjunction with the OCAs.

31. Violation of the Protective Order: The Government states at paragraph 3.q. of its proposed Protective Order that:

> Any unauthorized disclosure or dissemination of classified documents or information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of the Court and possible referral for criminal prosecution. Any breach of this Order may also result in the termination of a person's access to classified documents or information and a formal complaint to that person's state bar association.

32. Apparently, the Government believes that by underlying the word may, this is somehow responsive to the Defense's and Court's concerns about being subject to contempt proceedings and disbarment in the event of unauthorized disclosure. The way the Government's Protective Order is drafted, almost everything is deemed to be classified. The potential for the Defense and for the Court to violate the Government's Protective Order is not only real, but likely.

33. The term "may" does not explain any of the following: Who decides whether a Defense or Court disclosure should be reported to bar association? Will the Government prosecute the Defense or Military Judge for disclosing classified information? If so, under what standard? What if the information is not *actually* classified, but simply deemed to be classified (or, in the words of the Government, "treated as classified")? Does disclosing information that is "treated as classified" but not actually classified subject the Defense and the Court to criminal or disciplinary sanction? Is there a distinction between intentional, negligent and accidental

disclosure? Under what circumstances will a violation of the order result in a suspension of security clearances? Who decides whether the Defense's or the Court's security clearances will be revoked?

34. The point is that the Government has not provided any standard—much less a clear standard—to govern the very real concerns of the Defense and the Court. Given the incredibly broad nature of the Protective Order sought by the Government, the Defense is very concerned about inadvertently disclosing "classified" information. Where the Defense is not permitted to reference any actually classified information, information "to be treated as classified" or information "referring" or "relating" to national securi or intelligence matters, the Defense will be walking on eggshells for the next six months. The Defense does not wish to risk criminal sanctions and professional disciplinary proceedings because the Government wishes for anything and everything to be deemed classified. The whole purpose of the system put in place by the Defense's motion is to immunize it (and the Court) from criminal and ethical sanctions so long as the appropriate protocols are followed. The Government's Protective Order contains no such limitations.

35. The Government's Protective Order has the Defense wondering whether this is just a bad joke. The Defense cannot fathom how the Government could not see the failings of the system it proposes be in place to safeguard information which, while classified, has been in the public realm for the past two years.

B. Other Problematic Aspects of the Government's Protective Order

36. The Defense would also point to the following (non-exhaustive) list of issues with the Government's Protective Order:

- Under the Government's Protective Order, there is virtually no role for the Defense Security Experts. It seems that the Government envisages the Defense Security Experts as merely facilitating and opining on logistics (e.g. handling, storage). The Government states at paragraph 3.f. that "Detailed defense security experts are not authorized to make independent classification determination, that is, whether information is classified." As the Defense has repeatedly stated, the Government is missing the boat. The Defense experts would not make an "independent classification determination"—they would simply advise whether the Defense is permitted to say/write something in light of existing OCA determinations. Incidentally, it is ironic that the Government is so opposed to Defense experts making an "independent classification determination" when that is exactly what the Government is doing through the "treat as classified" designation.

- The Government excludes from paragraph 3.i. of its Protective Order one attorney who has been assigned to the Defense, CPT Joshua Tooman.

- The Defense opposes requesting approval of security clearances through the Trial Counsel as suggested at paragraph 3.i of its Protective Order. The Government does not have any incentive to process such requests expeditiously, as demonstrated by prior

history in this case. Instead, the Defense submits that the requests be processed through the Court Security Officer.

- The Government's restrictions with paragraph 3.l.(6) do not account for the Defense speaking with any of the OCAs either by deposition or by other pretrial interview. Additionally, this provision does not address situations where the Defense is interviewing unit witnesses, such as other intelligence analysts from PFC Manning's unit. These witnesses have knowledge of classified and other information that is the subject of this case. Under the Government's Protective Order, the Defense would have to engage in adversarial litigation in order to have equal access to key witnesses.

- The Government's restrictions on the accused's access to classified information in paragraph 3.m. of Protective Order are both unclear and unreasonable. The section indicates that "[i]f it becomes necessary for the accused to review or discuss classified matters, or otherwise meet with defense counsel, then the trial counsel shall coordinate this meeting. The defense counsel shall notify the trial counsel in writing, no less than ten calendar days in advance." It is unclear whether the Government's position is that for *any* meeting ("or otherwise meet with defense counsel"), the Defense counsel must pre-approve this request with the Government 10 days in advance.[11] The Defense assumes that this cannot be what the Government intended, as it does not need the Government's permission to visit the accused. As such, it must mean that if classified information is to be discussed, the Government needs 10 days to arrange the meeting. This is an unreasonable requirement. The Defense understands that there may be some logistical concerns with the confinement facility, but the Government does not need a week and a half to coordinate the accused's movement.

C. Addressing the Government's Concerns with the Defense's Protective Order and Associated Motions

37. The Government goes to great lengths to explain why the Defense's Protective Order "contains countless legal and factual errors"/ "clerical errors" and why the Order "violates the spirit of MRE 505(g)(1)." *See* Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 2. There are no such errors. In reality, the Government simply does not like the Defense's order because it takes the power away from the Government and places it in the hands of a third party neutral.

38. The Government says that a "major concern" is that the Defense is giving too much to the Court Security Officer to do. "Requiring the CSO to absorb all of these tasks ... may cause future delays, in addition to unnecessarily burden an expert upon whom the parties and the Court rely heavily." *See* Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 2. The Government makes much ado about nothing. All

[11] It is not clear whether the Government believes that the Defense must disclose the content of the classified information as a precondition to the meeting. This issue has arisen in the past, and the Defense submitted a Memorandum on 18 September 2010 detailing its position. *See* Attachment C. To the extent that the proposed provision can be read as requiring disclosure of the contents of the classified information, the Defense maintains that *United States v. Schmidt*, 60 M.J. 1 (C.A.A.F.) precludes the Government from requiring such disclosure.

these tasks are not administratively cumbersome. They involve verification of badges/paperwork; being the liaison for any persons who, in future, need security clearances (though there may be no such persons); making sure that Defense requests for equipment are submitted to the relevant entities, etc. In short, the Defense is asking that the Court Security Officer be the intermediary on these issues. That the Government claims these responsibilities are too burdensome for Mr. Prather, while the Defense claims they are not, underscores why Mr. Prather needs to testify as a witness.

39. The Government also quibbles with some semantic issues in the Defense's Protective Order. *See* Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 3. In response to the specific items raised by the Government:

i) The Defense is not clear on why the Government believes that it has "improperly define[d] [the] scope" of the Protective Order.
ii) The definition of "defense" is not problematic, as other provisions that are more specific refer to "defense experts." However, the Defense is happy to broaden that provision.
iii) The provision related to 505(h) is unobjectionable; the Government simply thinks it should be contained in a different motion.
iv) If the Government believes that the term "Government Intelligence Employees" is too narrowly defined, the Defense is happy to amend the list.
v) The Defense has included restrictions on the accused's access to classified discovery. *See* Defense Protective Order, paragraph 3.h.(3), 3.n.(10).

40. The minor nature of the Government's complaints shows that the Defense's Protective Order is virtually unobjectionable. This is not surprising given that the Defense has presented a logical, efficient, and common sense way of proceeding in this case (also essentially the same order originally used in the *Diaz* case). Indeed, it was "in light of these concerns"—concerns which the Defense just addressed in the two preceding paragraphs—that the Government asked the Court to deny the Defense's Protective Order. If these are indeed the Government's concerns with the Defense Protective Order, these concerns are very easily addressed.

41. The Government asks that the Court deny the Defense request for the production of the OCA. After a lengthy and repetitive history of the OCA process, the Government argues in one paragraph why the Defense's request should be denied:

> In sum, the Defense has failed to articulate why the anticipated testimony of the referenced OCA is "relevant and necessary." The witnesses' anticipated testimony, specifically to "obtain clarification … regarding the scope of its classification determination on referencing the OCA within court filings and open court" is "not relevant and necessary" <u>but instead simply requested to assist the Defense in safeguarding classified information</u>. (citations omitted, emphasis added).

See Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 5.

42. The Defense fully "admits" that the OCA is requested to assist the Defense (and the Court) in safeguarding classified information. The Defense is puzzled at why this means that the OCA is not "relevant and necessary." If there is an OCA that could clarify what the Defense (and the Court) can say and cannot say, how is that *not* "relevant and necessary" in a proceeding to determine how to protect information? The Government inexplicably puts a nefarious spin on the Defense requesting guidance on how to safeguard classified information.

43. Ultimately, the goal is to protect classified information. In order to do so, the Defense and Court must know what they can say or write without disclosing classified information. In this case, there is an added complication in that the Government (and apparently the OCA) believes that something can be "classified by inference." Accepting that to be true for the moment, then the Defense and Court must know what combination of otherwise unclassified information amounts to an impermissible disclosure of "classified by inference" information. The OCA can easily provide that guidance, likely in a 15 minute closed session. That way, all parties will know where they stand and the there is no need for the "treated as classified" list that the Government has proposed. We will actually be treating as classified that information which ***is actually classified***.

CONCLUSION

44. Based on the above, and its prior submissions, the Defense requests that the Court reject the Government's Protective Order in its entirety. It also renews its request for the Court to adopt the Defense's Protective Order as outlined herein.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel